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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT GENE MCNEELY,

Plaintiff - Appellant,

v.

D. PERRY; et al.,

Defendants - Appellees.

No. 06-16539

D.C. No. CV-02-05385-AWI

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted November 13, 2007^{**}

Before: TROTT, W. FLETCHER, and CALLAHAN, Circuit Judges.

California state prisoner Robert Gene McNeely appeals pro se from the district court's summary judgment in his action alleging defendants acted with deliberate indifference to his medical condition and violated the Americans with

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Disabilities Act (“ADA”). We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004), and we affirm.

The district court properly granted summary judgment in favor of defendant doctors Perry and Cain on McNeely’s Eighth Amendment claim, because the evidence does not create a material issue of fact as to whether the doctors’ attempts to treat McNeely were medically unacceptable under the circumstances or chosen in conscious disregard of an excessive risk to McNeely’s health. *See id.* at 1058. Moreover, McNeely’s conclusory allegation that defendants had the authority to transfer him to a different institution fails to create a triable issue. *See id.*

The district court also properly granted summary judgment on McNeely’s claim that defendants violated the ADA, because McNeely failed to show defendants denied him access to specific programs on the basis of his disability. *See Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996).

The district court did not abuse its discretion in denying McNeely’s motion for appointment of counsel because he did not demonstrate any exceptional circumstances. *See Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

AFFIRMED.